FILED
SEP 30 1955
HAROLD B. WILLEY, C

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 16

MARVIN STUART WALTON,
Petitioner,

vs.

PEOPLE OF STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara.

BRIEF FOR RESPONDENT.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Attorneys for Respondent.

Subject Index

	Page
Opinion below	1
Questions presented	2
Statement	2
Statement of the case	2
Statement of the facts	2
Summary of argument	4
Argument	8
I. The objection to the alleged involuntary blood sample is raised for the first time in the petition for certiorari	8
II. The propriety of the proposed jury instructions is purely a question of state law	9
III. Resolving the conflicts in the evidence in favor of the state, it appears that the defendant consented to the taking of the blood sample in question. No force or coercion, express or implied, was used by the police officers	10
IV. Assuming for purposes of discussion the taking of the blood sample was by force and coercion, nevertheless, neither the taking of the sample nor the introduction in evidence of the results of the analysis of the sample violated petitioner's constitutional right to be free from unreasonable search and seizure, the privilege against self-incrimination, or any generalized concept of due process	13
A. The taking of a blood sample against the will of an arrested person involves no violation of the constitutional provisions against unreasonable search and seizure, nor does admission in evidence of the results of the analysis of such samples violate the Fourteenth Amendment	13
B. The privilege against self-incrimination is not embraced in the due process clause of the Fourteenth Amendment, nor does the privilege have any application to the facts of this case	15

Page

C. The introduction in evidence of the results of the analysis of the blood sample did not violate due process; the act of taking the blood sample in no way fatally infected the fairness of the trial. The decision of Rochin v. California, 342 U.S. 165 (1951), should be reexamined 18

D. The due process concept as interpreted by the case of Rochin v. California, 342 U.S. 156 (1951), has no application to withdrawal of a blood sample.. 22

Table of Authorities Cited

Cases	Pages
Adamson v. California, 332 U.S. 46 (1947)	15
Ash v. State, 139 Tex. Cr. R. 420, 141 S.W. 2d 341 (1940)	22, 26
Biggs v. State, 201 Ind. 200, 167 N.E. 129 (1929)	26
Block v. People, 125 Colo. 36 (240 P. 2d 512) (1951), cert. den. 343 U.S. 978 (72 S.Ct. 1076, 96 L.Ed. 1370)	17
Bratcher v. United States, 149 Fed. 2d 742	24
Breithaupt v. Abram, 58 N.M. 385, 271 P. 2d 827 (1954)	25
Davis v. State, 189 Md. 640, 57 A. 2d 289	27
Gallegos v. Nebraska, 342 U.S. 55 (1951)	11
Green Lake County v. Domes, 347 Wis. 90, 18 N.W. 2d 348 (1945)	27
Halloway v. State, 146 Tex. Cr. R. 353, 175 S.W. 2d 258) (1943)	12
Harris v. South Carolina, 338 U.S. 68 (1948)	11
Harris v. United States, 331 U.S. 145 (1947)	14
Heath v. State, 156 Tex. Cr. R. 563, 244 S.W. 2d 815 (1952)	12
Hendrickson v. State, 93 Okla. Cr. 379, 229 P. 2d 196	20
Hicks and Bovey v. State, 93 N.Y.S. 2d 569 (Ct. of Claims, N.Y., 1949)	25
Holt v. United States, 218 U.S. 245 (1910)	27
Irvine v. California, 347 U.S. 128 (1953)	15
Jacobson v. Massachusetts, 197 U.S. 11 (1904)	24
Jones v. State, 90 Ga. App. 761, 84 S.E. 2d 124 (1954)	26
Jones v. State, 159 Tex. Cr. 29, 261 S.W. 2d 161 (1952), cert. den. 346 U.S. 830	18
Kerschwing v. Farrar, 114 Colo. 421, 166 P. 2d 154 (1946)	25
Lisenba v. California, 314 U.S. 219 (1941)	19
Lyons v. Oklahoma, 322 U.S. 596 (1944)	20, 21
Mooney v. Holohan, 294 U.S. 103 (1934)	19
Moore v. Dempsey, 261 U.S. 86 (1923)	19
Owens v. Commonwealth, 186 Va. 689, 43 S.E. 2d 895 (1947)	20

Pages

People v. Amaya, 40 Cal. 2d 70, 251 P. 2d 324 (1952)..... 12
People v. Block, 125 Colo. 36, 240 P. 2d 512 (1952), cert. den. 343 U.S. 978 25
People v. Burwell, 44 Cal. 2d....(44 A.C. 15)..... 20
People v. Dawson, 127 Cal. App. 2d 375, 273 P. 2d 938 (1954).....22, 26
People v. Haeussler, 41 Cal. 2d 252, 260 P. 2d 8 (1953)..17, 22, 25
People v. Howell, 41 Cal. 2d 252, 260 P. 2d 8 (1953), cert. denied 347 U.S. 931..... 25
People v. Hoyt, 20 Cal. 2d 306, 125 P. 2d 29 (1942)..... 12
People v. Kiss, 125 Cal. App. 2d 138, 269 P. 2d 924 (1954). 26
People v. Millum, 42 Cal. 2d 524, 267 P. 2d 1039 (1954)... 8
People v. Sallow, 165 N.Y.S. 915 (1917)..... 26
People v. Tucker, 88 Cal. App. 2d 333, 198 P. 2d 941 (1948) 25
People v. Trujillo, 32 Cal. 2d 105, 194 P. 2d 681 (1948)... 26
People v. Ward, 307 N.Y. 73, 12 N.E. 2d 211 (1954)..... 12
Powell v. Alabama, 287 U.S. 45 (1932)..... 19

Rex v. Brezack, 2 Dominion L.R. 265 (1950).....22, 26
Rex v. McIntyre, 2 Dominion L.R. 713 (1952)..... 26
Rex v. McNamara, 1951 Ontario Reports 6..... 26
Rex v. Nowell, 1 All E.R. 794 (1948)..... 26
Rochin v. California, 342 U.S. 165 (1951).....7, 18, 19, 20, 22, 27

Skidmore v. State, 59 Nev. 320, 92 P. 2d 979 (1939)..... 27
Snyder v. Massachusetts, 291 U.S. 97 (1933).....10, 19
State v. Alexander, 7 N.J. 585, 83 A. 2d 441 (1941).....17, 27
State v. Aspara, 113 La. 940, 37 So. 883 (1904)..... 26
State v. Ayres, 70 Idaho 18, 211 P. 2d 142 (1949).....17, 25
State v. Berg, 76 Ariz. 96, 259 P. 2d 261 (1953).....18, 22, 25
State v. Cash, 219 N.C. 818, 15 S.E. 2d 277 (1941).....17, 25
State v. Cram, 176 Ore. 577, 160 P. 2d 283, 164 A.L.R. 952 (1945).....17, 25
State v. Green, ... S.C. ....., 86 S.W. 2d 598 (1955)..... 26
State v. Green, 121 S.C. 230, 114 S.E. 317 (1922)..... 26
State v. LaPean, 247 Wis. 302, 19 N.W. 2d 289 (1945)..... 20
State v. McLaughlin, 138 La. 958, 70 So. 925 (1916)..... 26
State v. Small, 233 Iowa 1280, 11 N.W. 2d 377 (1943).....13, 17
State v. Sturtevant, 96 N.H. 99, 70 A. 2d 909 (1950).....12, 17
Stein v. New York, 346 U.S. 156 (1952).....10, 11, 19, 21

Pages

Taylor v. State, 213 P. 2d 588 (Okla. Crim., 1950) 22, 26
Turner v. Pennsylvania, 338 U.S. 62 (1948) 11
Twining v. New Jersey, 211 U.S. 78 (1908) 15

United States v. Heitner, 149 Fed. 2d 105 (1945) 12
United States v. Holt, 218 U.S. 245 (1910) 16
United States v. Kelly, 55 Fed. 2d 67 (1932) 26
United States v. Ong Sui Hong, 36 P. Is. 735 (1917) 26

Warickshall's Case, One Leich Crown, C.R.C. 3rd Ed. 298.. 20
Wolf v. Colorado, 338 U.S. 25 (1948) 15

Constitutions

United States Constitution:
Fifth Amendment 6, 15
Fourteenth Amendment 2, 6, 10, 13, 15, 19, 20

Statutes

California Civil Code, Section 79.01 24

California Health and Safety Code:
Section 2554 24
Section 21332 24
Section 21402 24

Selective Service Act 24

Universal Military Training and Service Act, 50 U.S.C. App. Section 454 24

Texts

American Law Institute's Model Code of Evidence (1942):
Rule 203 17
Rule 205 ..... 17, 26

22 A.L.R. 1189 24

40 Cal. L. Rev. 31 22

41 Cal. L. Rev. 728 22

Pages

30 Canada Bar Review 747 20

Interim Report of the New York State Joint Legislative Committee on Motor Vehicle Problems, Chemical Tests for Intoxication (1953), page 20 14

28 Journal of Criminal Law and Criminology 261 .....15, 18

66 Harv. L. Rev. 122 (1952), Freund Supreme Court 1951 Term 22

24 Iowa L. Rev. 191 (1939), Ladd and Gibson, The Medico-Legal Aspects of the Blood Tests to Determine Intoxication 13, 15

14 Md. L. Rev. 111, 136, 137 24

34 Minn. L. Rev. 1, Morgan, The Privilege Against Self-Incrimination 16

3 Wigmore:
Section 822, page 246 20
Section 823, page 249 20
Volume VIII, Section 2263, page 362 16

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 16

MARVIN STUART WALTON,
Petitioner,

vs.

PEOPLE OF STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara.

BRIEF FOR RESPONDENT.

OPINION BELOW.

The Appellate Department of the Superior Court in and for the County of Santa Clara, State of California, affirmed the judgment of the Municipal Court without opinion.

QUESTIONS PRESENTED.

Was the blood sample taken from the appellant by force or by coercion, expressed or implied, so that the taking of the sample or the introduction into evidence of the analysis of the sample violates the due process clause of the Fourteenth Amendment, the constitutional prohibition against unreasonable search or seizure, or the privilege against self-incrimination?

Does the allocation of preliminary questions of fact between the judge and the jury violate due process?

STATEMENT.

Statement of the Case.

Petitioner was arrested for speeding, driving without a license, and drunk driving, all misdemeanors, on May 8, 1953. He was arrested in Santa Clara County by State Highway Patrolmen. The complaint charged only drunk driving (a misdemeanor). (R 2.) Petitioner entered a plea of not guilty and was tried by a jury in the Municipal Court. (R 2.)

The jury returned a verdict of guilty. (R 138.) Petitioner prosecuted an appeal in the Appellate Department of the Superior Court in and for Santa Clara County. The judgment below was affirmed without opinion.

Statement of the Facts.

While on a routine patrol, Officers Shannon and Daly of the California Highway Patrol observed petitioner speed out from the parking area of a restau-

rant, cross the southbound traffic lane, and cut in front of another vehicle traveling north. The time was approximately 10:00 o'clock p.m. on a Friday evening and the traffic was heavy. Appellant's vehicle then accelerated and ricocheted from a traffic island. Petitioner's speed was clocked at 60 to 65 miles per hour in a 35 mile an hour speed zone. (R 9, 10.)

After being stopped, petitioner refused to give his name, was staggering in his walk, was repetitious in his conversation, and failed to exhibit a California Driver's license. (R 14, 15.)

Petitioner was then taken to the Accident Investigation Bureau in San Jose. While en route, he stated he had been drinking. (R 16.) Officer Shannon testified that petitioner was under the influence of intoxicating liquor. (R 19.)

While at the Accident Bureau, petitioner refused to perform the balance and coordination test which is normally given as a test for sobriety. (R 16, 17.) He was also requested to give a sample of blood. He refused to do so at first, but later consented. Petitioner finally rolled up his sleeve, stuck his arm out and said, "Well, take it." (R 42.) Appellant was in no way forced to submit to the blood test. (R 43.)

The technician who withdrew the blood sample testified that petitioner consented to taking of the blood. (R 52.) The technician stated that the officers did not touch the defendant. (R 54.) This technician has been licensed by the State of California since 1930 to take blood samples. (R 50.)

This technician also testified that in his opinion the petitioner was under the influence of liquor at the time. He noted there was an odor of alcohol on his breath, that his face was flushed, that his clothes were slightly mussed, that his eyes were bloodshot, pupils dilated, and his attitude very antagonistic. (R 51.)

The chemist who analyzed this sample testified that it contained 24 one-hundredths of one per cent of alcohol, and that this amount of alcohol would result in intoxication. (R 24.)

Petitioner's testimony concerning the blood test in question is as follows:

> "They rolled up my left arm, sleeve of my left arm, and injected the needle and removed the sample, although I continued to object." (R 82.)

Petitioner admitted that he was not pushed around or manhandled by the officers. (R 83.) Likewise, after the completion of the booking procedures, which included fingerprinting and photographing, he was permitted to make a phone call, and in fact was released on bail within a very short time. (R 83, 84.)

SUMMARY OF ARGUMENT.

1. The question presented by petitioner's brief has never been properly raised in the California Courts and involves at most the question of the credibility of the witnesses.

A. The constitutional question of the involuntary and coerced taking of the blood sample

and the introduction of the analysis of this sample in evidence was never properly raised in the California Courts. Neither a proper objection nor a motion to strike the evidence of the analysis of the blood sample was ever made at the trial. Likewise, the matter was not pursued on appeal in the California Courts. The only objection ever made in the trial as to the admissibility of the evidence was on the ground that it was hearsay.

B. There is a conflict in the testimony between the police officers and petitioner as to what occurred at the time of the withdrawal of the blood sample. The trier of fact has resolved this conflict in favor of the People. When the facts are so resolved, no constitutional question is presented.

2. The allocation of preliminary questions of fact between judge and jury are questions of state law and raise no constitutional issues.

3. Neither the taking of the blood sample nor the introduction in evidence of the analysis of the blood sample involves a violation of the constitutional prohibition against unreasonable search and seizure, self-incrimination, or the due process clause of the Fourteenth Amendment.

A. The taking of the blood sample does not involve the constitutional protection against unreasonable search and seizure; it seeks to protect a person's home, effects and possessions, and does

not extend to the physical examination of an accused.

The Constitution prohibits only an unreasonable search and seizure. The withdrawal of a blood sample from the accused as an incident to a valid arrest for drunk driving is a reasonable exercise of the state's power to protect the health, welfare and safety of its citizens.

It has long been the rule at common law that relevant and reliable evidence is admissible however obtained. Likewise, this Court has determined that the admission of evidence illegally obtained does not violate the due process clause of the Fourteenth Amendment.

B. The due process clause of the Fourteenth Amendment does not embrace a right similar to that of the Fifth Amendment to refuse to be a witness against oneself.

The privilege against self-incrimination is limited to testimonial compulsion and has no application to the compulsory disclosure of physical condition.

C. Even assuming that the blood sample was taken in violation of petitioner's rights, nevertheless its admission in evidence would not fatally infect the fairness of the trial. The overwhelming majority of Anglo-American jurisdictions exclude the coerced confession on the basis of untrustworthiness. It is this possibility of falsehood that fatally infects the trial so as to render

the admission in evidence of a coerced confession a violation of the due process clause of the Fourteenth Amendment. The element of untrustworthiness does not exist as to the analysis of a blood sample taken from the defendant. Thus its introduction in evidence does not fatally infect the fairness of the trial. Its introduction in evidence is no violation of the Fourteenth Amendment.

D. The doctrine of the *Rochin* case has no application to the facts in this case. The person from whom the blood sample was taken was validly arrested for drunk driving, and he was in no way mistreated by the officers. The withdrawal of the blood sample is a simple, non-dangerous, common procedure. It is in no way brutal and shocking nor is it unreasonable.

A state pursuant to its power over the health, welfare and safety of its citizens could properly provide for the extraction of a blood sample from any person arrested for drunk driving. States have passed numerous analogous statutes requiring vaccination, blood tests prior to marriage, pregnancy blood tests, physical examination and Wasserman Tests for individuals reasonably believed to be infected with venereal disease. Likewise, nearly every adult male has been subjected to blood tests under The Draft Act and while in military service.

Numerous Anglo-American Courts have passed upon the admissibility of the analysis of blood

samples and upon the admission of analogous evidence, and have not been shocked.

ARGUMENT.

I.

THE OBJECTION TO THE ALLEGED INVOLUNTARY BLOOD SAMPLE IS RAISED FOR THE FIRST TIME IN THE PETITION FOR CERTIORARI.

Before a question may be raised in this Court, it must have been properly raised in the Court below. During the trial petitioner did not object to the introduction of the blood sample evidence upon the ground that it was taken by coercion. Although petitioner could have raised a due process objection on appeal even though no timely objection was made in the trial Court, he did not raise this question on appeal. (See *People v. Millum,* 42 Cal. 2d 524, 267 P. 2d 1039 (1954), a confession case.)

Petitioner contends that he objected to the introduction of the blood sample evidence upon the ground that the sample was obtained by force. A reading of pages 50, 51, 34 and 25 of the record will convince the Court that the sole basis of petitioner's objection to the introduction of this evidence was that the testimony of the results of the chemist's analysis was hearsay.

At no point in the record did appellant object to the introduction of the analysis of the blood sample on the ground that it was obtained in violation of due process, or the constitutional prohibition against

unreasonable search and seizure. Likewise, he did not assert that the introduction of this testimony violated the defendant's privilege against self-incrimination. At no point in the record did petitioner move to strike this evidence on any of these grounds. The only reference in the record to any violation of defendant's constitutional rights is found in the jury instructions which the defense counsel submitted to the judge for approval. (R 144.)

This conclusion is supported by the fact that the question here presented was not raised on appeal in the Appellate Department of the Santa Clara Superior Court. This fact is established by Statement on Appeal filed in the Appellate Department of the Superior Court. (R. 147.) In this statement appellant contends that the testimony concerning the blood sample analysis was hearsay; that the Court erred in refusing to give his instructions (instructions 8, 9, 10 and 11, R 144) concerning the blood tests and that the prosecutor exceeded the proper scope of cross-examination. It thus appears that no federal question was raised in the trial Court or on appeal.

The question of the involuntary nature of the taking of the blood sample is raised for the first time in this Court.

II.

THE PROPRIETY OF THE PROPOSED JURY INSTRUCTIONS IS PURELY A QUESTION OF STATE LAW.

Whether or not the proposed jury instructions concerning blood samples obtained by force correctly

state the law in the abstract is of no consequence. Whether such instructions should be given to a jury is purely a question to be determined by state procedure. The allocation of questions of fact between judge and jury does not raise a Fourteenth Amendment problem. (*Stein v. New York,* 346 U.S. 156 at 179 (1952) (confession case); *Snyder v. Massachusetts,* 291 U.S. 97 at 105 (1933), (abolition of a jury not a violation of due process-dictum).) Alleged involuntary confessions are treated variously. Some states treat the question as one for the judge, others as a question for the jury, and a third group permits the question to be passed on by both judge and jury.

The proper allocation of the functions of the judge and the jury as to preliminary questions of fact which affect admissibility is a question for the determination for the California Courts. The procedure used in this case has been determined to be proper for misdemeanor actions.

III.

RESOLVING THE CONFLICTS IN THE EVIDENCE IN FAVOR OF THE STATE, IT APPEARS THAT THE DEFENDANT CONSENTED TO THE TAKING OF THE BLOOD SAMPLE IN QUESTION. NO FORCE OR COERCION, EXPRESS OR IMPLIED, WAS USED BY THE POLICE OFFICERS.

The question presented by this case is primarily only one of credibility. The trier of the fact has resolved this question in favor of the People of the State of California. Resolving the conflicts in the

evidence, it appears that defendant's consent to the taking of the blood sample was free and voluntary.

The petitioner has overlooked an important appellate rule. Only evidence which is uncontradicted by the state in its version of the attendant circumstances is considered on appeal in determining whether there has been a denial of due process. (*Stein v. New York,* 346 U.S. 156, 181, 183-184 (1952); *Gallegos v. Nebraska,* 342 U.S. 55, 61-63 (1951); *Harris v. South Carolina,* 338 U.S. 68, 69 (1948); *Turner v. Pennsylvania,* 338 U.S. 62, 63 (1948).)

There is a conflict between the witnesses for the prosecution and the testimony of the petitioner. This conflict, however, has been resolved by the trier of fact in favor of the prosecution.

The testimony of Officer Shannon was that petitioner was asked to submit to a blood test. He raised his sleeve then changed his mind on the subject. This occurred a couple of times. He finally raised his arm and said, "take it." (R 42, 43.) Petitioner was not forced to submit to the blood test. (R 43.)

The technician who withdrew the blood sample testified that the officers did not touch the defendant. (R 54.) He also testified that petitioner consented to the taking of the blood sample. (R 52.)

Petitioner admitted that he was not shoved around or manhandled. (R 83.)

It is well established in confession cases that a confession may be free and voluntary even though the petitioner is in custody and is questioned by officers

and not informed of his right to counsel. (*People v. Amaya,* 40 Cal. 2d 70, 76, 251 P. 2d 324 (1952); *People v. Hoyt,* 20 Cal. 2d 306, 314, 125 P. 2d 29 (1942); *United States v. Heitner,* 149 Fed. 2d 105, 108 (1945).)

These same principles have been applied by state Courts to the taking of samples of body fluids. Thus, cases have held that defendant need not be warned of his right to counsel before taking the blood sample. (*Heath v. State,* 156 Tex. Cr. R. 563, 244 S.W. 2d 815 (1952); *People v. Ward,* 307 N.Y. 73, 12 N.E. 2d 211 (1954).)

Also, the fact that defendant was intoxicated at the time does not render the consent to the taking of a blood sample involuntary. (*Halloway v. State,* 146 Tex. Cr. R. 353, 175 S.W. 2d 258 (1943); *State v. Sturtevant,* 96 N.H. 99, 70 A. 2d 909 (1950).)

The alleged forced withdrawal of a blood sample is, thus, without substance when any conflict between opposing witnesses is resolved in favor of the prosecution.

IV.

ASSUMING FOR PURPOSES OF DISCUSSION THE TAKING OF THE BLOOD SAMPLE WAS BY FORCE AND COERCION, NEVERTHELESS, NEITHER THE TAKING OF THE SAMPLE NOR THE INTRODUCTION IN EVIDENCE OF THE RESULTS OF THE ANALYSIS OF THE SAMPLE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE, THE PRIVILEGE AGAINST SELF-INCRIMINATION, OR ANY GENERALIZED CONCEPT OF DUE PROCESS.

A. The Taking of a Blood Sample Against the Will of an Arrested Person Involves No Violation of the Constitutional Provisions Against Unreasonable Search and Seizure, Nor Does Admission in Evidence of the Results of the Analysis of Such Samples Violate the Fourteenth Amendment.

The argument has been made that the taking of a blood sample or the physical examination of a person solely to determine his physical condition is not a search or seizure within the intent of the constitutional provisions. The provision against unreasonable search and seizure was intended to protect persons in their possessions and effects. It seeks to prevent unwarranted intrusion into one's home and unwarranted search of one's person for papers and possessions. Possessions and the sanctity of the home are protected by the constitutional provision, but it does not prohibit disclosure of the physical condition of an arrested person. (See Ladd and Gibson, The Medico-Legal Aspects of the Blood Test to Determine Intoxication, 24 Iowa L. Rev. 191 (1939); *State v. Small,* 233 Iowa 1280, 11 N.W. 2d 377 (1943).)

Assuming that the extraction of a blood sample involves a search and seizure, nevertheless, such a search and seizure offends no constitutional right.

The Constitution prohibits only an unreasonable search and seizure. The rule at common law and in federal Courts provides for a reasonable search incident to a valid arrest. (*Harris v. United States,* 331 U.S. 145 (1947).) Such a search does not violate the constitutional prohibition against unreasonable search and seizure. In the present case the blood sample was extracted as an incident to defendant's valid arrest for drunk driving, just as his fingerprints and photograph were taken.

Of course, the very statement of the problem in terms of reasonable and unreasonable search and seizure implies that the solution is more or less subjective.

We feel that the extraction of the blood sample is a reasonable action incident to a valid arrest for drunk driving. We are not alone in our view. Our view finds support in numerous judicial and legislative decisions on this and analogous problems; e.g., see Interim Report of the New York State Joint Legislative Committee on Motor Vehicle Problems, Chemical Tests for Intoxication, p. 20, 1953. Since the argument that the extraction of blood samples from persons arrested for drunk driving is a reasonable search, is identical with the argument that such action does not violate any generalized concept of due process, this question will be discussed at length under heading IV(C).

Furthermore, even assuming that extraction of the blood sample was an unreasonable search and seizure, the introduction of the evidence of the analysis of such

sample would not violate the due process clause of the Fourteenth Amendment. (*Wolf v. Colorado,* 338 U.S. 25 (1948); *Irvine v. California,* 347 U.S. 128 (1953).) Indeed, the common law has always admitted all relevant and competent evidence, whether or not illegally obtained. Likewise, other common law jurisdictions, including a majority of the states, follow an identical rule. Certainly, if due process is measured by Anglo-American concepts of fairness, by historical practice, and the collected wisdom of common law jurisdictions, the introduction in evidence of illegally obtained evidence is not violative of due process.

B. The Privilege Against Self-incrimination Is Not Embraced in the Due Process Clause of the Fourteenth Amendment, Nor Does the Privilege Have Any Application to the Facts of This Case.

This Court has determined that the due process clause of the Fourteenth Amendment does not embrace a right similar to that guaranteed by the Fifth Amendment to refuse to be a witness against oneself. (*Twining v. New Jersey,* 211 U.S. 78 (1908); *Adamson v. California,* 332 U.S. 46 (1947).)

The history of the privilege against self-incrimination establishes that it prohibited testimonial compulsion and has no application to compulsory disclosure of physical condition—such as blood tests. For a discussion of the history of the privilege see Inbau, Self-incrimination—What can an accused person be compelled to do, 28 Journal of Criminal Law and Criminology 261; Ladd and Gibson, The Medico-Legal

Aspects of the Blood Tests to Determine Intoxication, 24 Iowa L. Rev. 191 (1939); Morgan, The Privilege Against Self-incrimination, 34 Minn. L. Rev. 1.

Current legal thinking supports this view. Wigmore, 3rd ed., Vol. VIII, p. 362, sec. 2263, states the principle as follows:

> "Looking back at the history of the privilege (*ante,* sec. 2250) and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence."
>
> * * * * * * *
>
> "In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion.* The one idea is as essential as the other."

Likewise, this Court in an opinion written by Mr. Justice Holmes, *United States v. Holt,* 218 U.S. 245, 252 (1910), stated:

> "Another objection is based upon an extravagant extension of the Fifth Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort com-

munications from him, not an exclusion of his body as evidence when it may be material."

This is also the view of the leading authorities as reflected in the American Law Institute's Model Code of Evidence (1942). Rule 203 of the Model Code of Evidence provides that a person may refuse to disclose to a public official any matter that will incriminate him, but rule 205 says that "No person has a privilege under Rule 203 to refuse (a) to submit his body to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition, or (b) to furnish or to permit the taking of samples of body fluids or substances for analysis."

Likewise, the question as to the application of the privilege to the introduction in evidence of the analysis of blood samples has arisen in numerous state cases. The state Courts have overwhelmingly determined that the privilege did not apply. State Courts have refused to reject blood sample evidence on the self-incrimination ground. (*People v. Haeussler,* 41 Cal. 2d 252, 260 P. 2d 8 (1953); *State v. Cram,* 176 Ore. 577 (160 P. 2d 283, 289, 164 A.L.R. 952) (1945); *State v. Sturtevant,* 96 N.H. 99 (70 A. 2d 909, 911-912) (1950); *State v. Ayres,* 70 Idaho 18 (211 P. 2d 142, 144) (1949); *State v. Alexander,* 7 N.J. 585 (83 A. 2d 441, 445) (1951); *Block v. People,* 125 Colo. 36 (240 P. 2d 512, 515-516) (1951), cert. den. 343 U.S. 978 (72 S.Ct. 1076, 96 L.Ed. 1370); *State v. Cash,* 219 N.C. 818, 15 S.E. 2d 277 (1941); *State v. Small,* 233 Iowa 1280, 11 N.W. 2d 377 (1943).)

In analogous situations the Courts have held that no violation of the privilege against self-incrimination was involved. For example, results of the chemical test of breath specimens, *Jones v. State,* 159 Tex. Cr. 29, 261 S.W. 2d 161 (1952), cert. den. 346 U.S. 830; *State v. Berg,* 76 Ariz. 96, 259 P. 2d 261 (1953).

One writer has set out numerous factual situations analogous to the present problem where the privilege against self-incrimination has been held inapplicable. See Inbau, Self-incrimination—What can an accused person be compelled to do?, 28 Journal of Criminal Law and Criminology 261.

C. The Introduction in Evidence of the Results of the Analysis of the Blood Sample Did Not Violate Due Process; the Act of Taking the Blood Sample in No Way Fatally Infected the Fairness of the Trial. The Decision of Rochin v. California, 342 U.S. 165 (1951), Should Be Reexamined.

We do not doubt the power of this Court to determine that the taking of a blood sample is a violation of due process. This question depends upon the meaning of the term "due process." This concept appears to be like a middle-aged man's waistline; it just keeps expanding, and its chief limitation is personal self-control. We do, however, doubt the soundness of the decision in *Rochin v. California,* 342 U.S. 165 (1951). The admission in evidence of the narcotic in the *Rochin* case involved no violation of the Fourteenth Amendment as measured by historical and present day concepts applicable to the admissibility of confessions or other illegally obtained evidence.

Let us assume for the purpose of discussion that the taking of the blood sample was an unreasonable search and seizure or violated some other constitutionally protected right. Nevertheless, the results of the analysis of the blood sample is reliable and competent evidence of petitioner's condition at the time he was arrested for drunk driving.

Indeed, the theory of the Fourteenth Amendment as enunciated by this Court in numerous decisions requires that the unfairness must "fatally infect the trial." (*Lisenba v. California,* 314 U.S. 219, 236 (1941).) Prior to the decision of *Rochin v. California,* 342 U.S. 165 (1951), this Court had adhered to that doctrine. In every instance the violation of due process entered into and infected the very judicial proceeding. Thus, for example, *Powell v. Alabama,* 287 U.S. 45 (1932), involved the deprivation of the right of an accused to counsel; *Snyder v. Massachusetts,* 291 U.S. 97 (1933), involved the right of the accused to be confronted with the witnesses against him; *Moore v. Dempsey,* 261 U.S. 86 (1923), involved right of an accused to a trial free from mob domination; *Mooney v. Holohan,* 294 U.S. 103 (1934), involved alleged knowing use of perjured testimony by the prosecution; *Stein v. New York,* 346 U.S. 156 (1952) coerced confession.

Indeed, the fact that someone acted unconstitutionally in obtaining the evidence does not affect its admissibility. The defendant's rights were invaded prior to the introduction of the evidence in the Court of law. The admission of relevant and reliable evidence

is no violation of his right. A prior violation of his right does not fatally infect the trial unless the evidence does not properly furnish a "premise from which a civilized forum will infer guilt." (*Lyons v. Oklahoma,* 322 U.S. 596, 605 (1944).)

The decision in *Rochin v. California,* 342 U.S. 156 (1951), recognizes this difficulty but attempts to avoid this question by analogizing the conduct condemned in the *Rochin* case to that in the confession cases. The opinion of the Court asserts that the fact that a coerced confession is unreliable and presumptively false, is not the reason for excluding such confessions. The basis upon which a violation of the Fourteenth Amendment is predicated in confession cases is the misconduct in obtaining them. We submit that this premise of the *Rochin* case is historically unsound, is not in accord with the Anglo-American concept as to the admissibility of confessions, or the accumulated wisdom of the common law jurisdictions.

The exclusion of confessions on the ground of their unreliability dates from *Warickshall's* case, *One Leich Crown,* C.R.C. 3rd Ed. 298. This has been the fundamental reason for the exclusion of such confessions ever since. See 3 *Wigmore,* p. 246, sec. 822, p. 249, sec. 823. This is also the reason stated by the overwhelming majority of states. See, for example, *People v. Burwell,* 44 Cal. 2d ..... (44 A.C. 15); *Hendrickson v. State,* 93 Okla. Cr. 379, 229 P. 2d 196; *Owens v. Commonwealth,* 186 Va. 689, 43 S.E. 2d 895 (1947); *State v. LaPean,* 247 Wis. 302, 19 N.W. 2d 289 (1945). Also see 30 *Canada Bar Review* 747.

This Court itself has recognized that the unreliability of a coerced confession is the element which fatally infects the trial and renders its admission in evidence a violation of due process. (*Stein v. New York,* 346 U.S. 156, 181, 193 (1952); *Lyons v. Oklahoma,* 322 U.S. 596, 605 (1944).)

This Court in *Stein v. New York,* 346 U.S. 156 (1952) at 192, stated:

> ". . . Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. But reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void state convictions while forced confessions will do so."

Since the evidence of the analysis of a blood sample and the analysis of the contents of other body fluids may be completely reliable and competent evidence of guilt not subject to falsehood, its admissibility does not violate due process even though the act of taking such sample may or may not have violated some constitutional or statutory right of the defendant.

D. The Due Process Concept as Interpreted by the Case of Rochin v. California, 342 U.S. 156 (1951), Has No Application to Withdrawal of a Blood Sample.

The decision of *Rochin v. California,* 342 U.S. 156 (1951), has invoked numerous interpretations as to its theory and its application to various factual situations. Thus, the *Rochin* case has been interpreted to prohibit an invasion of the body (*State v. Berg,* 76 Ariz. 96, 259 P. 2d 261 (1953); to exclude evidence obtained as a result of violent and brutal conduct; *People v. Haeussler,* 41 Cal. 2d 252, 260 P. 2d 8 (1953); to exclude evidence obtained by a whole procedure of force and not merely forceful stomach pumping, Freund Supreme Court 1951 Term, 66 Harv. L. Rev. 122 (1952); 40 Cal. L. Rev. 31; and to violence and force applied to one illegally arrested. For discussion see generally 41 Cal. L. Rev. 728.

We feel that under the proper theory the *Rochin* case prohibits only brutal and shocking force as applied to one illegally arrested or detained. Thus, it does not upset cases such as *Ash v. State,* 139 Tex. Cr. R. 420, 141 S.W. 2d 341 (1940) (enema to recover stolen rings); *Rex v. Brezack,* 2 Dominion L.R. 265 (1950) (forcefully opening an accused's mouth); *People v. Dawson,* 127 Cal. App. 2d 375, 273 P. 2d 938 (1954) (force applied to compel accused to spit out narcotics); *Taylor v. State,* 213 P. 2d 588, 591, 594, Okla. Crim. (1950) (the defendant was given castor oil after X-ray showed him harboring jewelry).

Certainly, the extraction of a blood sample from a person legally arrested is not shocking, nor brutal,

nor in any way offensive to civilized standards if measured by statutes and decisions of the overwhelming majority of common law jurisdictions. The crucial test of whether such conduct is unreasonable, much less brutal and shocking, is whether the state legislature under its power to protect the health, welfare and safety of its citizens could validly pass legislation requiring persons arrested for drunk driving to submit to a blood test.

The increase in the number of highway accidents and deaths has been and is a major problem throughout the nation. Drinking drivers are a menace to the safety of the highways. In twenty-four (24) out of one hundred (100) fatal accidents, the driver or pedestrian had been drinking. Among the drivers involved in fatal accidents for whom condition was stated, eighteen (18) out of one hundred (100) had been drinking. Among the reporting states, drinking drivers involved in fatal accidents ranged from five (5) out of one hundred (100) to forty-one (41) out of one hundred (100). See Accident Facts, 1954 Edition, National Safety Council, page 52. The annual report of the California Highway Patrol indicates that the driver had been drinking in approximately 23% of all rural motor vehicle traffic accidents in California. Certainly, a state may exercise its power on behalf of the health, welfare and safety of its citizens and by legislation require anyone arrested for drunk driving to submit to a blood test.

A blood analysis aids in determining the innocent as well as in determining the guilty. There are sev-

eral conditions, such as the syndrome of diabetic coma and the administration of numerous drugs, including the anti-histamines which would produce conditions comparable to alcoholic inebriety. (14 Md. L. Rev. 111, 136, 137.)

States exercised their power to protect the health, welfare and safety of their citizens by passing analogous legislation. Thus, the states have required citizens to submit to vaccinations, *Jacobson v. Massachusetts*, 197 U.S. 11 (1904), and to submit to a blood test as a condition of getting married, California Civil Code Section 79.01. A similar test is required of all pregnant women, California Health and Safety Code Section 21402.

Likewise, numerous states have required persons to submit themselves to medical examinations, including Wasserman Tests on probable cause that they are infected with venereal diseases. (See Health and Safety Code, Sections 2554 and 21332.) Also see 22 A.L.R. 1189 (compulsory examination for venereal disease.) Likewise, innumerable young men have been subjected to physical examinations, including blood tests under The Selective Service Act and the Universal Military Training and Service Act, 50 U.S.C. App. Sec. 454, and while in the military service. (See A.R. 40-340, A.R. 40-365.) Also see *Bratcher v. United States*, 149 Fed. 2d 742, 745. There statutes would indicate that there is nothing unreasonable in such a requirement. The state has the power to require an individual to submit to blood tests when arrested for drunk driving in order to better protect the safety

of its citizens. If the legislature has such a power, then the police have an implied power to withdraw blood samples, or at least the withdrawal of such a blood sample by the police officer is not constitutionally unreasonable. Police have exercised such implied powers in the development of many of their procedures, such as fingerprinting and photographing.

Likewise, the extraction of blood samples is certainly not brutal or shocking or even unreasonable when viewed in the light of the many decisions in England, Canada and the United States.

Thus, in several cases the state Courts have approved the withdrawal of blood samples from an accused while he was unconscious and thus unable to consent. See *People v. Haeussler,* 41 Cal. 2d 252, 260 P. 2d 8 (1953); *State v. Cram,* 176 Ore. 577, 160 P. 2d 283 (1945); *Kerschwing v. Farrar,* 114 Colo. 421, 166 P. 2d 154 (1946); *People v. Tucker,* 88 Cal. App.2d 333, 198 P. 2d 941 (1948); *State v. Ayres,* 70 Idaho 18, 211 P. 2d 142 (1949); *Hicks and Bovey v. State,* 93 N.Y.S. 2d 569 (Ct. of Claims, N.Y., 1949); *People v. Block,* 125 Colo. 36, 240 P. 2d 512 (1952), cert. den. 343 U.S. 978; *People v. Howell,* 41 Cal. 2d 252, 260 P. 2d 8 (1953), cert. denied 347 U.S. 931; *Breithaupt v. Abram,* 58 N.M. 385, 271 P. 2d 827 (1954).

Likewise, several decisions have stated that the analysis of blood samples would be admissible even though taken against the defendant's will. (*State v. Cash,* 219 N.C. 818, 15 S.E. 2d 277 (1941); *State v. Berg,* 76 Ariz. 96, 259 P. 2d 261 (1953); *People v.*

Kiss, 125 Cal. App. 2d 138, 143, 269 P. 2d 924 (1954); *Rex v. McNamara,* 1951 Ont. Reports 6, 11.) Also see *Rex v. McIntyre* (1952), 2 Dominion Law Report 713; *Rex v. Nowell* (1948), 1 A11 E.R. 794. Also see Rule 205, Model Code of Evidence, American Law Institute.

Likewise, an officer can, over the objection of the accused and without his consent, open the accused's hand to find evidence, *State v. Green,* 121 S.C. 230, 114 S.E. 317 (1922); scrape under accused's finger nails, *State v. McLaughlin,* 138 La. 958, 70 So. 925 (1916); take off accused's shoes for the purpose of making footprints, *Biggs v. State,* 201 Ind. 200, 167 N.E. 129 (1929); take off accused's clothing for comparison and tests, *People v. Trujillo,* 32 Cal. 2d 105, 194 P. 2d 681 (1948); *State v. Aspara,* 113 La. 940, 37 So. 883 (1904); give accused an enema to recover jewelry swallowed by him, *Ash v. State,* 139 Tex. Crim. Rep. 420, 141 S.W. 2d 341 (1940); *Taylor v. State,* Okla. Crim. App., 213 P. 2d 588 (1950); take accused's fingerprints, *People v. Sallow,* 165 N.Y.S. 915 (1917); *United States v. Kelly,* 55 Fed. 2d 67 (1932); compel accused to discharge narcotics from his mouth which he concealed when arrested, *United States v. Ong Sui Hong,* 36 P. Is. 735 (1917); *People v. Dawson,* 127 Cal. App. 2d 375, 273 P. 2d 938 (1954); *Rex v. Brezack,* 2 Dominion L.R. 265 (1950); *Jones v. State,* 90 Ga. App. 761, 84 S.E. 2d 124 (1954); require accused to submit to compulsory physical examination, *State v. Green,* ..... S.C. ....., 86 S.W. 2d 598 (1955); require a man to put on a coat

to see whether it fits, *Holt v. United States,* 218 U.S. 245 (1910); *Green Lake County v. Domes,* 347 Wis. 90, 18 N.W. 2d 348 (1945); *Skidmore v. State,* 59 Nev. 320, 92 P. 2d 979 (1939).

The taking of an accused's blood over his objection and without his consent is within the power of peace officers and in the same category as above. *Davis v. State,* 189 Md. 640, 57 A. 2d 289 at 291, stated:

> "... There is no substantial difference between obtaining a specimen of blood from an accused and obtaining his fingerprints, or physical property, ..."

To the same effect is *State v. Alexander,* 7 N.J. 585, 83 A. 2d 441 (1941).

This Court itself has indicated that the taking of body fluid samples and the introduction into evidence of the analysis of these samples does not violate due process.

In *Rochin v. California,* 342 U.S. 156 (1951), at page 174, the Court states:

> "In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record ..."

Thus, it appears that the taking of a blood sample against the will of the accused is not brutal and shocking or even unreasonable and the introduction in evidence of the analysis of this sample does not violate due process. The officers acted properly. The officers obtained the blood sample as an incident to a valid arrest of the accused for drunk driving. They exercised an ancient power in a modern manner.

Dated, San Francisco, California,
September 28, 1955.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorneys for Respondent.

FILED
OCT 17 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 16

MARVIN STUART WALTON,
Petitioner,
v.
PEOPLE OF STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara.

PETITIONER'S REPLY BRIEF

JAY A. DARWIN,
68 Post Street,
San Francisco 4, California,
Attorney for Petitioner.

ROBERT F. PECKHAM,
68 Post Street,
San Francisco 4, California,
Of Counsel.

In The

Supreme Court of the United States

October Term 1955

No. 16

Marvin Stuart Walton,
Petitioner,
v.
People of State of California,
Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara.

PETITIONER'S REPLY BRIEF

I.

Respondent asks the Court to repudiate the *Rochin* decision. The adoption of the argument advanced for this purpose would cause serious retrogression in the law relating to coerced confessions as well as to the law of forcible extraction of real evidence.

Respondent uses such language as follows:

> "Indeed, the fact that someone acted unconstitutionally in obtaining the evidence does not affect its admissibility. The defendant's rights were invaded prior to the introduction of the evidence in the Court of law. The admission of relevant and reliable evidence is no

violation of his right." (Respondent's brief, pp. 19-20.)

. . . . . .

"The opinion of the Court asserts that the fact that a coerced confession is unreliable and presumptively false, is not the reason for excluding such confessions. The basis upon which a violation of the Fourteenth Amendment is predicated in confession cases is the misconduct in obtaining them. We submit that this premise of the *Rochin* case is historically unsound, is not in accord with the Anglo-American concept as to the admissibility of confessions, or the accumulated wisdom of the common law jurisdictions." (Respondent's brief, p. 20.)

The coerced confession cases have been the result of the application of two constitutional standards:

First, a confession causes the reversal of a case where extracted by police methods causing too great a likelihood of falsity.

Brown v. *Mississippi*, 297 U.S. 278 (1936)
Chambers v. *Florida*, 309 U.S. 227 (1940)

Second, a conviction will be reversed when the confession is extracted by police means offensive to due process regardless of the veracity of the confession.

Ashcraft v. *Tennessee*, 322 U.S. 143 (1944)
Malinski v. *New York*, 324 U.S. 401 (1945)
Haley v. *Ohio*, 332 U.S. 596 (1948)

In *Lisenba* v. *California*, 314 U.S. 219, 236, Mr. Justice Roberts, in the opinion of the Court, stated:

"The aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence, whether true or false."

No convincing need has been presented to this Court to limit itself to the common law rationale.

Rochin was simply an application of the second standard to the extraction of real evidence by offensive police methods. We submit that a repudiation of *Rochin* would serve only as an encouragement to offensive police practices. To

lift the restraint upon such offensive state police methods would be a calamity in the constitutional realm of civil liberties.

II.

Respondent contends that the extraction of blood is a reasonable search of petitioner's person incident to his arrest and compares the procedure with that of fingerprinting and photographing the petitioner.

The Fourth Amendment of the U. S. Constitution provides in part:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated * * *"

In *Wolf* v. *Colorado,* 338 U.S. 632 (1950), the Court held that the security of one's privacy against police intrusion —the core of the Fourth Amendment—is a right which is implicit in the concept of ordered society and, as such, is enforceable against the states through the due process clause of the Fourteenth Amendment. Therefore, the forcible extraction of blood from his veins for use as evidence of his intoxication in a criminal proceeding constitutes a search and seizure within the meaning of the Fourth Amendment. The question arising then is: Does such a forcible extraction of blood over protest amount to an unreasonable search, even when done incident to an arrest? It is our view that it does. We are not alone in the view that the reasonableness of the search incident to arrest ends when the police forcibly invade the body to extract evidence against the will and over the protest of the accused.

U. S. v. *Willis,* 85 F. Supp. 745 (D.C. Calif. 1949)
Re *Guzzardi,* 84 F. Supp. 294 (D.C. Texas 1944)

In *U. S.* v. *Willis,* the defendant was taken to a hospital and his stomach was pumped. The court held that this was an unreasonable search, irrespective of whether the defendant was under lawful arrest. We note with interest what the Judge there stated:

> "* * * if a search such as was made in the instant case may be approved, would it not likewise follow that if narcotics, after being swallowed, had passed from the stomach to the blood stream, some officers might feel it incumbent upon them to drain the defendant of part of his life blood in an effort to discover the hidden evidence?"

We believe that once the Court permits the intrusion of the sanctity of the individual person under the guise of reasonable search incident to arrest, the invitation will have been tendered for further official invasion of the person. It is to be noted that the *Willis* case has met with favorable comment.

Marq. L. R. 34: 52-55
Temp. L. Q. 23: 418-420
U. Detroit L. J. 13: 220-222

The extraction of blood from petitioner in the instant case constitutes an unreasonable search irrespective of whether done as incident to a valid arrest or under the authority of a search warrant. Such a search has not been viewed as reasonable within the Fourth Amendment.

Harris v. *U. S.*, 331 U.S. 145
Weeks v. *U. S.*, 232 U.S. 383 at 392-393
Gouled v. *U. S.*, 225 U.S. 298 at 309
Carroll v. *U. S.*, 267 U.S. 132 at 149-150
Agnello v. *U. S.*, 269 U.S. 20 at 30
U. S. v. *Lefkowitz*, 285 U.S. 452 at 465-466

In *Harris* v. *U. S.*, *supra*, the case respondent cited for the proposition that the search here was reasonable, the Court stated the rule thusly:

> "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."

The object of the search here—the extraction of blood—was to obtain evidentiary material, analogous to private papers and documents containing incriminating revelations. Therefore, the extraction of blood under these circumstances is an unreasonable search and seizure.

Respondent, at page 14 of its brief, cites the Interim Report of the New York State Joint Legislative Committee on Motor Vehicles, "Problems, Chemical Tests for Intoxication," in support of its view that the search here is reasonable. It is interesting to note that the New York Legislature after due consideration of all the inherent constitutional problems involved here, and contrary to the cited Report, did not enact a law empowering the police to extract bodily fluids by force.

New York Laws, 1953, New York Vehicles and Traffic Law, Sec. 71a

The New York statute provides in substance:

1. Any person who operates a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to believe such person to have been driving in an intoxicated condition and in accordance with the rules and regulations established by the police force of which he is a member. If such person, having been placed under arrest, has thereafter been requested to submit to such chemical test, the test shall not be given but the commissioner shall revoke his license or permit to drive; provided, however, the commissioner shall grant such person an opportunity to be heard but a license or permit may upon the basis of a sworn report of the police officer that he had reasonable grounds to believe such arrested person to have been driving in an intoxicated condition and that said person had refused to submit to such test, be temporarily suspended without notice pending the determination upon any such hearing.

2. Upon the request of the person who was tested, the results of such test shall be made available to him.

3. Only a physician acting at the request of a police officer can withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a urine, saliva or breath specimen.

4. The person arrested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer.

We find in this statute an effort to equate the problem of intoxicated drivers as a menace to society, with the constitutional limits of proof of such drunkenness. The Council of State Governments has proposed a similar model law for the states.

Journal of Crm. Law, Crminol. and Pol. Sci. 45:542, Note 6

A contrast between the operation of this statute and the facts of the instant case serves to illustrate the unreasonable nature of the search here. Under the New York law, if an accused refuses a test for intoxication, the test is not given by force but the driving privileges of the accused are revoked. A further safeguard included in the statute, but refused petitioner here, is permission to have a physician of his own choosing administer a chemical test in addition to the one given by the police doctor. Only a physician can be used by the police for the purpose of extraction of blood.

Contrary to the contention of respondent, the only state having met the problem here presented, with comprehensive legislation, has provided reasonable procedures for chemical tests without the use of force and its consequent constitutional problems.

Notwithstanding the decisions of *Wolf* and *Irvine*, we submit that evidence obtained as a result of wrongful invasion of the person should be excluded and the conviction reversed. For the invasion of the person by means of coercion to extract blood is more offensive to our concepts of the sanctity of the individual than a trespass to seize his property. We have already noted in our opening brief that the

court has recognized in *Irvine* that the coercive invasion of the person motivated a different result from a coercive invasion of his property.

The exclusion of such evidence is a necessary safeguard to the protection of this constitutional right. Mere judicial declaration of the unconstitutionality of such police conduct has been of no avail. The weakness of other ineffectual remedies available to the accused is familiar to the Court. Nor can we look to the Civil Rights Statute as an effective deterrent as was seen from the reference to the Department of Justice for investigation of the police conduct in *Irvine*. In a letter to the Stanford Law Review, dated February 15, 1955, Warren Olney III, Assistant Attorney General in Charge of the Criminal Division, wrote:

> "When the [complaint against the officers involved in the *Irvine* case] came to our attention, the Federal Bureau of Investigation conducted a full investigation * * * The results of that investigation revealed some significant facts which did not appear in the records or the opinion of the Supreme Court and were apparently unknown to the Court at the time of its review of the case * * * [T]he police officers who placed the detectograph or microphone in * * * Irvine's home were acting under orders of the Chief of Police, who in turn was acting with the full knowledge of the local District Attorney. This fact, together with * * * Section 653h of the California Penal Code, [which] expressly provide[s] for such conduct, forced us to the conclusion that it would be both useless and inadvisable to present [the] matter to the Federal grand jury. Our decision was largely influenced by the belief that the Government * * * would not be able to satisfy the rigid standard of intent imposed by the Supreme Court * * * in the *Screws* case. * * *"
>
> 7 Stanford Law Review 76 at 94, Note 75

Repelled by the continued disregard of constitutional safeguards on the part of law enforcement officers in this connection, the Supreme Court of California recently repudiated its former rule and held that such evidence is inadmissible.

People v. *Cahan,* 44 Adv. Cal. 461, 282 P. (2d) 905 (April 27, 1955)

Under the law of California today, the forcible extraction of blood from an accused, would be an unreasonable search and seizure, and would not be admissible. In the case of *People* v. *Haeussler,* 41 Cal. 2nd 252, 260 P. (2d) 8 (1953), cited by respondent at pp. 17, 22, and 25 of its brief, decided before *Irvine,* and its consequent repercussion in *People* v. *Cahan, supra,* the California Supreme Court indicated that the blood extracted from Mrs. Haeussler was improper and amounted to an unreasonable search and seizure, but because the federal exclusionary rule had not yet been adopted, refused to reverse.

III.

Respondent contends that *Rochin* prohibits only brutal and shocking force as applied to an accused who is illegally detained. This view would cause this Court to impose an unnecessarily retrogressive limitation in this field. A distinction drawn on the basis of the legality of the detention would sanction brutal and shocking force if the detention was legal. Again, such an interpretation would only be an invitation to further infringement upon constitutional rights.

Respondent argues that the extraction of blood by force incident to an arrest is not offensive to civilized standards. In our opening brief, we anticipated this attack when we urged that what is offensive to the community's sense of fairness is the use of force to extract evidence from the body of an accused, against his will. Respondent states that the crucial test of whether such conduct is unreasonable and offensive is whether a state legislature could pass legislation requiring persons arrested for drunk driving to submit forcibly to a blood test. Certainly the public policy considerations to curb drunk drivers like those to eradicate narcotic traffic, are urgent and compelling. However, we submit that state law enforcement is not so lacking in resourcefulness, that the only solution is one that erodes

the constitutional rights of the individual. Constitutional means are available to combat the problem of the drunk driver. We have already discussed above the New York legislation whose provisions do not require a resort to physical force.

None of the legislative measures cited by Respondent on page 24 of its brief, where blood analysis is provided is for the purpose of extracting evidence to be used against an accused in a criminal prosecution. All such legislative measures relate to the use of the police power to protect the citizens' health, welfare and safety, and do not have as their purpose the procuring of evidence from the person to be used against him as the accused.

CONCLUSION

For the reasons stated, it is respectfully submitted that the conviction of petitioner must be reversed.

Dated: San Francisco, California

October 15, 1955

JAY A. DARWIN,
Counsel for Petitioner.

ROBERT F. PECKHAM,
Of Counsel.